No. 86-870

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

PHILLIPS PETROLEUM COMPANY and CINQUE BAMBINI PARTNERSHIP,

Petitioners,

vs.

STATE OF MISSISSIPPI and SAGA PETROLEUM U.S., INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

BRIEF AMICI CURIAE OF THE CITY OF ELIZABETH, NEW JERSEY, A MUNICIPAL CORPORATION, AND NEW JERSEY LAND TITLE ASSOCIATION, A NEW JERSEY CORPORATION, IN SUPPORT OF PETITIONERS ON THE MERITS

JOHN R. WEIGEL
Attorney for Amici Curiae
264 Fisher Place
Princeton, New Jersey 08540
(609) 452-1166

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MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE

1. On February 23, 1987 this Court granted the motion of the City of Elizabeth, New Jersey, a municipal corporation, and the New Jersey Land Title Association, a New Jersey corporation, to file a brief *amici curiae* out of time in this matter and in support of the petition for a writ of certiorari to the Supreme Court of Mississippi. On the same date the Court granted the petition for a writ of certiorari.

2. The *amici curiae* previously sought a final adjudication of the nature and scope of the sovereign ownership rights of their state in *City of Newark v. Natural Resource Council*, 82 N.J. 530, 414 A. 2d 1304 (1980), *cert. denied*, 449 U.S. 983 (1980).

3. This case concerns the nature and scope of the ownership rights the State of Mississippi possesses as an incident of its municipal sovereignty. Because the United States Constitution requires parity between the 50 states as respects political standing and sovereignty, a decision by the Court on the merits of this case necessarily will implicate the sovereign ownership rights of all of the states.

4. The brief *amici curiae* attached to this motion stresses the national importance of the issue presented as it defines the sovereign ownership rights of the 13 original states and the states thereafter admitted into the Union under the Equal Footing Doctrine. The briefs of the various parties to the appeal may not emphasize the national importance of this issue nor the historical development of these sovereign ownership rights in England and in the 13 original states. Importantly, the briefs of the parties may not describe the chaotic conditions that have existed in New Jersey in the last two decades as the State of New Jersey has sought to retroactively expand its sovereign ownership claims into vast areas of interior, tide-flowed meadowlands and wetlands which are not, and never have been, navigable.

5. This motion and the attached brief *amici curiae* are being submitted to the Court prior to May 9, 1987, the deadline for the filing of the first brief on the merits by a party. Allowing the filing of the brief *amici curiae* will not prejudice any party.

Wherefore, the City of Elizabeth, New Jersey and the New Jersey Land Title Association pray for an order allowing the filing of the attached brief *amici curiae* on their behalf in the above-

captioned case and in support of petitioners on the merits.

Respectfully submitted,

JOHN R. WEIGEL
Attorney for Amici Curiae

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INTEREST OF THE AMICI CURIAE

This case presents an issue of importance to the 50 states and their political subdivisions and citizens concerning the

ownership rights a state possesses as an incident of its municipal sovereignty.

The *amicus curiae* City of Elizabeth is a municipal corporation, situated in Union County, New Jersey, and a political subdivision of the State of New Jersey. It owns of record certain lands in Elizabeth which are non-navigable but claimed to be owned in fee simple absolute by the State of New Jersey on the basis of the tideland doctrine, a substantive real property law doctrine of the state which holds that lands now or formerly flowed, naturally, by the mean high tide are state-owned, without regard to whether or not they were ever navigable. Additionally, a significant portion of the tax base of the City of Elizabeth is today in jeopardy as a result of the State of New Jersey's application of the tideland doctrine. Millions of dollars of real property, much of which was purchased for then full value and improved decades ago by its private record owners, is today claimed by the State of New Jersey under the tideland doctrine, notwithstanding the fact it has been assessed and taxed for years by the City of Elizabeth to its private record owners to help pay the costs of government.

The *amicus curiae* New Jersey Land Title Association is a New Jersey corporation and the trade association of the title insurance underwriters which write substantially all of the title insurance written in New Jersey. Title insurance indemnifies owners and mortgagees for losses, including losses arising from defects and failures of title. Until the late 1950's the State of New Jersey routinely applied a dual test of navigability and tidal ebb and flow as the basis for its sovereign ownership rights. Thereafter, as the economic value of tide-flowed meadowlands and wetlands held in private record ownership increased significantly, the State of New Jersey simply eliminated the element of navigability from its test of sovereign ownership and retroactively expanded its ownership claims into vast areas of interior, tide-flowed

meadowlands and wetlands which are not, and never have been, navigable. For nearly 300 years, until the abrupt change in the late 1950's, sovereign ownership rights in New Jersey were limited to lands which, in their natural condition, were both flowed by the mean high tide and navigable. The member companies of the New Jersey Land Title Association have insured the private record ownership of countless thousands of titles which are today claimed to be owned by the State of New Jersey as a result of its retroactive expansion of its sovereign ownership claims into vast areas of interior, tide-flowed meadowlands and wetlands which are not, and never have been, navigable.

BRIEF SUBMITTED PURSUANT TO RULE 36.4

This brief *amici curiaè* is submitted pursuant to Rule 36.4, the City of Elizabeth being a political subdivision of the State of New Jersey.

SUMMARY OF ARGUMENT

The sovereign ownership rights of the 50 states are dependent upon federal constitutional principles which define the nature and scope of their municipal sovereignty, and those sovereign ownership rights are not dependent, in the first instance, upon the substantive real property law of each of the 50 states. As of the date of its entry into the Union, federal constitutional principles relating to the state's municipal sovereignty limit its sovereign ownership rights to the navigable waterways within its boundaries. Thereafter, the substantive real property law of the state takes over and determines dispositions and the title consequences of any subsequent shifts or changes in the beds of the said navigable waterways. Likewise, a state thereafter may resign certain of its sovereign ownership rights, as New Jersey has done with respect to fresh-water navigable waterways and as other states have done with respect to the band of land between the mean high water

line and the mean low water line, but it may not retroactively expand its sovereign ownership rights into vast areas of interior, tide-flowed meadowlands and wetlands which are not, and never have been, navigable.

The purpose underlying sovereign ownership of waterways is the protection of public rights of navigation and commerce from private interruption and encroachment. By definition, non-navigable areas are not amenable to public rights of navigation and commerce, and, therefore, sovereign ownership of such non-navigable areas is not necessary for the protection of those public rights since they simply do not adhere there. Nor is sovereign ownership of these non-navigable areas mandated by any environmental concern; environmental protection of ecologically sensitive, non-navigable areas can be secured by a system of land use regulations which control the impact of private land use decisions and prevent them from causing public harm.

Consistent with this purpose of protecting public rights of navigation and commerce, sovereign ownership rights are limited to waterways which are navigable in fact. The rights of the public are entirely dependent on the capacity of the waterway for navigation and on its functional utility as a public artery for transportation and commerce. This is the rule of the English common law as well as the rule adopted and applied in this country. Under the English common law "tidal ebb and flow" is a term of limitation of sovereign ownership rights within navigable waterways, and it is not a term of expansion of sovereign ownership rights into non-navigable areas. Both under the English common law and American law the functional utility of the waterway for public transportation and commerce, and not tidal ebb and flow, determines its public character and the dominion and ownership of the sovereign.

Retroactive expansion of sovereign ownership claims into vast

areas of interior, tide-flowed meadowlands and wetlands which are not, and never have been, navigable will create chaos and economic blight in the coastal margin of this country and wherever there are fresh-water wetlands. Dubious and costly mapping of state ownership claims will take years to complete. Ultimately, most asserted sovereign ownership claims will be disputed and contested on legal and equitable grounds by record property owners, thereby taxing administrative and judicial systems. Constantly changing tidal datums will add even more uncertainty to the title boundary between public and private land. An orderly system of land conveyancing requires that the boundary between public and private land remains as constant over time as it can, given the natural changes which occur along any waterway. The maximum certainty and continuity over time are achieved by containing sovereign ownership rights to the well-defined beds of navigable waterways rather than expanding those ownership rights into vast areas of interior, tide-flowed meadowlands and wetlands which are not, and never have been, navigable.

ARGUMENT

THE SOVEREIGN OWNERSHIP RIGHTS OF THE 50 STATES ARE LIMITED BY FEDERAL CONSTITUTIONAL PRINCIPLES TO THE NAVIGABLE WATERWAYS WITHIN THEIR BOUNDARIES, AND THOSE SOVEREIGN OWNERSHIP RIGHTS DO NOT EXTEND INTO INTERIOR, TIDE-FLOWED MEADOWLANDS AND WETLANDS WHICH ARE NOT, AND NEVER HAVE BEEN, NAVIGABLE.

At the time of the American Revolution the people of each of the 13 original states became themselves sovereign and, in that capacity, hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the United States Constitution to

the general government. *Martin v. The Lessee of Waddell*, 16 Peters 367, 410 (1842).[1] *See* United States Constitution, Article

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1. This was an action in ejectment involving 100 acres of oyster bed in Raritan Bay in Perth Amboy, New Jersey at a place where the Bay was both navigable and tidal. This Court was called upon to construe charters made by King Charles II of England to his brother James, Duke of York in 1664 and 1674 and subsequent conveyances under which the territory in the grant became vested in the Board of Proprietors of the Eastern Division of New Jersey. Afterwards in 1702, the Board of Proprietors surrendered all of the powers of government to Queen Anne of England, retaining the Board's rights of private property. Mr. Chief Justice Taney stated: (1) The right of the king to make the grant, with all of its prerogatives and powers of government, cannot at this day be questioned. *Id.*, 408; (2) The English possessions in America were not claimed by right of conquest but by right of discovery, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered. *Id.*, 409; (3) The land described in the charters was held by the king in his public and regal character as the representative of the nation and in trust for them, and the crown, according to the principles of the British Constitution, was the proper organ to dispose of the public domains. *Id.*, 409; (4) A true construction of the charters reveals that their object was to enable the Duke of York to establish a colony upon the newly discovered continent, to be governed, as nearly as circumstances would permit, according to the laws and usages of England. *Id.*, 412; (5) "And in the judgment of the court, the land under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; and were to be held by him in the same manner, and for the same purposes that the navigable waters of England, and the soils under them, are held by the crown." *Id.*, 413-414; (6) This opinion is confirmed by referring to similar and contemporaneous grants by different monarchs of the Stuart dynasty for the purposes of settlement and colonization of other large territories upon this continent. "In all of them, from the time of the settlement to the present day, the previous habits and usages of the colonists have been respected, and they have been accustomed to enjoy, in common, the benefits and advantages of the navigable waters for the same purposes and to the same extent that they have been used and enjoyed for centuries in England." *Id.*, 414, and (7) The same principles of construction applied by the Court to the charters apply with equal force to the surrender of the powers of government in 1702. *Id.*, 414-415. *See Den v. Jersey City*, 15 Howard 426 (1853); *Hoboken v. Pennsylvania Railroad Company*, 124 U.S. 656 (1888).

1, Section 8, paragraph 3. Under the Equal Footing Doctrine new states, upon their admission into the Union, acquired title to the lands underlying navigable waters within their boundaries. *Pollard's Lessee v. Hagan*, 3 Howard 212 (1845)[2]; *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company*, 429 U.S. 363, 370 (1977). Lands under navigable waters were not

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2. This was an action in ejectment involving certain tidelands along the Mobile River in Mobile, Alabama. The Act of Congress of March 2, 1819 admitting the State of Alabama into the Union provides in section 6 "that all navigable waters within the said State shall forever remain public highways, free to the citizens of said State, and of the United States, without any tax, duty, impost, or toll therefor, imposed by the said State." *Id.*, 229. Similar provisions are contained in most of the Acts of Congress admitting new states into the Union. 1 *Waters and Water Rights* 48, Farnham, The Lawyers' Co-operative Publishing Company (1904). Prior to the formation of the federal government in 1789, the old Congress adopted a resolution on September 6, 1780 recommending that the old states voluntarily surrender their "waste and unappropriated lands" to the United States to aid in paying the public debt incurred during the American Revolution. Many of the old states did make such surrender and cession. This Court held in *Pollard's Lessee v. Hagan, supra* at 224:

> The object of all of the parties to these contracts of cession was to convert the land into money for the payment of the debt, and to erect new States over the territory thus ceded; and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease.
>
> Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new States will be complete, throughout their respective borders, and they, and the original States, will be upon an equal footing, in all respects whatever. We, therefore, think the United States hold the public lands within the new States by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new States, for that particular purpose.

granted by the United States Constitution to the federal government but were reserved to the states. *Pollard's Lessee v. Hagan, supra* at 230.

As then Mr. Justice Rehnquist observed in *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979), any reliance on judicial precedent must be predicated upon a careful appraisal of the purpose for which the concept of "navigability" was invoked in a particular case. The purpose underlying sovereign ownership of waterways is the protection of public rights of navigation and commerce from private interruption and encroachment. *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387, 436 (1892). Mr. Justice Field stated:

> So also, by the common law, the doctrine of the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable

> waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.

Id., 436-437. This Court held that the State of Illinois' title to lands under navigable waters is "different in character" from that which the state holds in lands intended for sale:

> It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.[3]

Id., 452. Placing ownership of navigable waters and the soils under them in the sovereign assures protection of public rights of commerce, navigation and fishing. As was stated in *Barney v. Keokuk*, 94 U.S. 324, 338 (1876):

> [T]he public authority ought to have entire control of the great passage ways of commerce and navigation, to be exercised for the public advantage and convenience.

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3. This Court held that the Act of the Illinois Legislature of April 16, 1869 in conveying to the Illinois Central Railroad Company one mile of the bed of Lake Michigan in front of the City of Chicago amounted to an abdication of sovereignty "over lands under the navigable waters of an entire harbor," and "[s]uch abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public." *Id.*, 452-453.

The right of each state in the Union to all of its navigable waters and the soils under them was not altered by The Submerged Lands Act, 43 U.S.C.A. 1301, *et seq.*, which was enacted on May 22, 1953. The Act merely confirmed the states' pre-existing rights in the beds of the navigable waterways within their boundaries by, in effect, quitclaiming all federal title thereto. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, supra* 372, footnote 4. In explaining the purpose of the Act, it is said in 1 *Shore and Sea Boundaries* 118, Shalowitz, U.S. Department of Commerce, Coast and Geodetic Survey, Publication 10-1 (December 1978 reprint):

> [I]t should be remembered that the basic consideration of the act is that the submerged lands must be under the *navigable* waters within its state boundaries.

Federal Constitutional Principles Define State Sovereign Ownership Rights.

The nature and scope of the municipal sovereignty of the 50 states is dependent upon federal constitutional principles, and those sovereign ownership rights are not dependent, in the first instance, upon the substantive real property law of each of the 50 states. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, supra* at 374 and 381. The parity between the states as respects political standing and sovereignty is a federal constitutional requirement. *United States v. Texas*, 339 U.S. 707, 719-720 (1949). The ownership of navigable waters and the soils under them within state boundaries is "an inseparable attribute of the political sovereignty guaranteed equally to all States . . ." *United States v. Louisiana*, 363 U.S. 1, 77 (1960). *See Pollard's Lessee v. Hagan, supra* at 230 [the new states have the "same rights, sovereignty, and jurisdiction" over their navigable waters and the soils under them as the 13 original states]; *United States*

v. Texas, supra at 716. The ownership rights involved arise as an incident of the state's municipal sovereignty. We are not dealing here with substantive real property law as such, but rather with an issue substantially related to the constitutional sovereignty of the states. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, supra* at 374 and 381.

A state's sovereign ownership rights are initially fixed by federal constitutional principles at the time of its entry into the Union to the beds of the navigable waterways within its boundaries. *Martin v. The Lessee of Waddell, supra; Pollard's Lessee v. Hagan, supra. See Shively v. Bowlby*, 152 U.S. 1 (1894) for a review of decisions of this Court "upon the subject of public and private rights in lands below high water mark of navigable waters." *Id.*, 11. Thereafter, the substantive real property law of the state takes over and determines dispositions and the title consequences of any subsequent shifts or changes in the beds of the said navigable waterways. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, supra* at 370-371 and 377-378. In general, the states are at liberty to resign or convey their title[4] to riparian proprietors, subject only to the paramount right of navigation over the waters. The State of New Jersey has resigned its ownership rights to the lands under fresh-water navigable waterways; it has never asserted such rights and has accepted that such lands are subject to private ownership. Likewise, various of the states have accepted that the band of land between the mean high water line and the mean low water line is subject to private ownership.[5] This Court stated in *Barney v. Keokuk, supra* at 339:

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4. *Illinois Central Railroad Company v. Illinois, supra* 452-453, provides one limitation on the conveyance by a state of public trust lands.

5. The diversity of the substantive real property law of the various states relating to the ownership of shore land is set forth in a 1960 report for the (Cont'd)

> If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.

Misinterpretation of *The Royal Fishery of the Banne* Case.

Chancellor Kent of the New York Supreme Court originated the erroneous doctrine that at common law only tidal waterways were navigable. In *Palmer v. Mulligan*, 3 Caines 307 (1805), 2 Am. Dec. 270, which was an action for building upon the bed of the Hudson River in such a way as to interrupt the rafting of timbers into plaintiff's dam, and to change the course of the water, Chancellor Kent said that "the Hudson at Stillwater is a fresh water river, not navigable in the common-law sense of the term, because the tide does not ebb and flow at that place. In the *Royal Fishery of the Banne*, it was resolved that by the rules and authorities of the common law every river where the sea does not ebb and flow was an inland river, not navigable, and belonged to the owners of the adjoining soil." This erroneous doctrine was carried by Chancellor Kent into his *Commentaries* and was soon afterwards adopted by Joseph K. Angell in his *Treatise on the Right of Property in Tide Waters and in the Soils and Shores Thereof*, published by Harrison Gray, Boston (1826).

(Cont'd)
American Society of Civil Engineers entitled "State Regulation of Coastal Structures." *See* 2 *Shore and Sea Boundaries, supra* at 533, footnote 104. This report on the boundary between public and private lands notes that of the seven Great Lakes states, four use the water's edge, one the low-water mark, one the high-water mark, and one ordinary high water; of the five Pacific Ocean states, four use mean high water and one, Alaska, uses mean low water; of the five Gulf states, two use mean high water, one uses lower high water, one highest water during winter, and one mean higher high water; and of the 15 Atlantic states, eight use mean high water and seven use mean low water, with one of the latter group, Maryland, using mean high water for Chesapeake Bay.

These two text books were so universally used in this country during its early history that the doctrine was widely circulated and commonly accepted. 1 *Waters and Water Rights, supra* at 104. Professor Henry Phillip Farnham of Yale dismissed Chancellor Kent's doctrine in these words:

> Since Chancellor Kent's doctrine was based entirely on the *Banne Case* it is very evident that it is not supported by the authorities cited, and since the doctrine is not that of the common law the theory must be regarded as unsound.

Id., 109.

In *The Royal Fishery of the Banne,* Davies Rep. 149 (circa 1604)[6] the court classified rivers as of two kinds—navigable and not navigable—and said:

> Every navigable river, so high as the sea flows and ebbs in it, is a royal river, and the fishery of it is a royal fishery, and belongs to the King by his prerogatives; but in every other river not navigable, and in the fishery of such river the terre tenants on each side have an interest of common right.

The court did not define a "navigable river" but merely said that in navigable rivers subject to the ebb and flow of the tide the title to the soil was in the sovereign, while in non-navigable rivers the title was in the adjoining land owners. As noted in 2 *Shore and Sea Boundaries, supra* at 519:

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6. This case involved the ownership of part of a fishery in the Banne River, about two leagues from the sea where the stream was tidal, under a grant of land from the crown adjoining the fishery together with the fisheries within the land, but excepting three parts of the fishery. The question raised was whether the grant carried with it ownership of the fourth part. The court answered this question in the negative.

> This left a strip of navigable water—the point where the tide ceased to the point where the navigable character of the river ceased—upon which the court made no ruling as to the ownership of the soil. Yet the inference has been drawn, erroneously, that in England the only rivers that are navigable are those in which the tide ebbs and flows.

The true English doctrine is that navigable water is not synonymous with or limited to tide water but comprehends all waters that are used for public transportation and commerce. Lord Chief Justice Matthew Hale, in his treatise *De Jure Maris*, chapters 1 and 2 (*Hargrave's Law Tracts;* Hall, *Seashore*, Appx.), which was written soon after the decision in *The Royal Fishery of the Banne, supra,* makes no distinction between fresh and salt rivers in point of navigability, for he says "there be other rivers, as well fresh as salt, that are of common or public use for carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are prima facie *publici juris* common highways for man or goods." 1 *Waters and Water Rights, supra* at 113; 2 *Shore and Sea Boundaries, supra* at 519.

Professor Farnham states that the "rule that navigable water is not synonymous with or limited to tide water dates back in England to the very earliest reports on record." 1 *Waters and Water Rights, supra* at 112. He traces the development of the English doctrine of navigability (*id.*, 112-116) and concludes:

> That navigability does not depend on the tide is conclusively shown by the fact that tidal water is regarded as navigable only as it is so in fact.' In

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7. One of the cases cited by Professor Farnham for this proposition is *Glover v. Powell*, 10 N.J. Eq. 211 (Chan. 1854). This case involved Little Timber

(Cont'd)

> such waters, even navigability will depend on capability of being used for useful purposes of navigation, of trade and travel in the usual and ordinary modes, and not the extent and manner of the use; a stream is navigable in fact and in law when it is capable in its natural and ordinary volume of water of transporting in a marketable condition the products of the contiguous country.

Id., 116-117. "Tidal ebb and flow" is a term of limitation of sovereign ownership rights within navigable waterways, and it is not a term of expansion of sovereign ownership rights into non-navigable areas.

(Cont'd)
Creek, a small creek, emptying into the Delaware River about five miles below the City of Camden, New Jersey. The tide, when not obstructed, ebbs and flows about two miles up the creek. The Chancellor stated:

> It appears, from the pleadings, that at certain states of the tide, this creek, if unobstructed, is navigable by small flat bottomed boats for at least two miles from its mouth. It does not appear that it ever has been used for the purposes of navigation. It has not been navigated since the year 1760. There is no allegation, on the part of the defendants, and nothing in the case to show that its navigation *now* is demanded by the public interest, or that, as a navigable stream, it would be any way beneficial to the public for the purposes of trade or agriculture. Admit, for the sake of argument, that the state legislature has not the power permanently to obstruct or to destroy any navigable river within its territorial jurisdiction, it does not follow that any creek or rivulet, in which the tide ebbs and flows, and which may be used at certain tides by small boats for individual convenience, is to be dignified with the appellation of an arm of the sea or navigable river . . .

Id., 222-223.

The misinterpretation of *The Royal Fishery of the Banne, supra,* resulted in the admiralty jurisdiction of the United States being limited to tide waters until 1851 when this Court decided *The Propeller Genesee Chief v. Fitzhugh*, 12 Howard 441. This Court held that there must be "a perfect equality in the rights and privileges of the citizens of the different states," and this parity must exist "not only in the laws of the general government, but in the mode of administering them." *Id.*, 454. Mr. Chief Justice Taney stated that "equality does not exist" if the commerce on the lakes and the navigable waters of the West is not protected in the same way that the United States Constitution protects "the States bordering on the Atlantic." *Id.*, 454. He reasoned that limiting the admiralty jurisdiction to tide waters made sense in England and in the 13 original states because there the far greater part of the navigable waters are tide waters. *Id.*, 454-455. He pointed out, however, the arbitrariness of such a rule if used as one of general application throughout this country:

> Now, there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jursidiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it.

Id., 454.

As detailed above in this Argument, sovereign ownership rights are based on a waterway being "navigable in fact." This Court formulated the definition of that term in *The Daniel Ball*, 77 U.S. 557, 563 (1870):

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on waters.

If the waterway is navigable in fact, the sovereign ownership rights extend from bank to bank. Those sovereign ownership rights, however, do not extend interior of the banks of the waterway and include tide-flowed meadowlands and wetlands which are not, and never have been, navigable.

Chaotic Conditions from Application of Tidal Ebb and Flow Test into Non-Navigable Areas.

If the retroactive expansion by the State of Mississippi of its sovereign ownership claims into tide-flowed wetlands which are not, and never have been, navigable is permitted to stand, other states will be encouraged to follow suit. Chaos and economic blight will be the sure and certain result not only in the coastal margin but also anywhere there are interior, fresh-water wetlands. New Jersey's sad experience with tideland delineation during the last two decades is what awaits the rest of this country if the judgment of the Supreme Court of Mississippi is not reversed.

In the late 1950's, after nearly 300 years in which New Jersey's interior meadowlands had been universally considered to be subject to private ownership, the State of New Jersey, for the first time, asserted a sovereign ownership claim to them. *Final Report of the New Jersey Commission to Study Meadowland Development*, page 3, (Meyner Commission) (June 1965). New Jersey's highest court upheld these sovereign ownership claims in *O'Neill v. State Highway Department*, 50 N.J. 307 (1967), 235 A. 2d 1, and wrote

out of New Jersey's substantive real property law the element of navigability from the dual test of navigability and tidal ebb and flow that had been applied consistently until that time. *Arnold v. Mundy*, 6 N.J.L. 1 (Sup. Ct. 1821), 10 Am. Dec. 356; *Bell v. Gough*, 23 N.J.L. 624 (E. & A. 1852); *Stevens v. Paterson and Newark Railroad Company*, 34 N.J.L. 532 (E. & A. 1870), 3 Am. Rep. 269; *Ross v. Mayor and Council of Edgewater*, 115 N.J.L. 477 (Sup. Ct. 1935), 180 At. 866, *affirmed*, 116 N.J.L. 447 (E. & A. 1936), 184 At. 810. Since no inventory of sovereign-owned lands existed, it was suggested in *O'Neill v. State Highway Department, supra* at 320 that one be prepared. The New Jersey Legislature responded by enacting a Meadowlands Mapping Act, New Jersey Statutes 13:1B-13.1 *et seq*. On January 14, 1970 the State of New Jersey published its claims maps in the Hackensack Meadowlands (Bergen and Hudson Counties).[8] These claims maps were suppressed for evidentiary purposes on September 8, 1971 in *State of New Jersey by the Commissioner of Transportation v. The Council in the Division of Resource Development of the State of New Jersey*, Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-12561-68 (not officially reported).

The State of New Jersey's multimillion-dollar second attempt at tideland delineation will produce a series of 1,623 maps; the first map in the series was published on June 13, 1973 and the last is expected to be published by December 31, 1987. According to the February 11, 1987 report of the agency making the maps (Office of Environmental Analysis, New Jersey State Department of Environmental Protection), 61.8% of the 1,568 maps prepared by that date depict "formerly flowed" tidelands. Countless thousands of parcels of real estate in 17 of New Jersey's 21 counties are claimed by the state as "formerly flowed" tidelands. Many

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8. Among the claims on these maps was a State of New Jersey claim of sovereign ownership to virtually the entire Town of Kearny in Hudson County. In the 1970 federal decennial census Kearny had a population of 37,262.

of these properties have been free of any tide flow for generations. They were purchased years ago in good faith and for then fair market value by their record owners. Most have been assessed and taxed for years to support government. These properties are located not only near existing waterways but also in low-lying areas far removed from any navigable watercourses. With the improvements made by their then record owners long ago, most of the "formerly flowed" tidelands are today indistinguishable from other fastland.

Although the Governor of New Jersey has tried to defuse an explosive situation by publicly promising that the state will not move to dispossess any homeowners, the tideland claims maps remain on file in the land records, and the claims impair any sale or mortgaging of these properties. No judicial or administrative mechanism exists which provides a quick and inexpensive resolution of these tideland claims. The State of New Jersey has not yet recognized the overwhelming equities on the side of the record property owners, arising from the fact the state sat back for years and did nothing to assert its tideland claims, while its citizens were purchasing these properties for then fair market value, improving them, and paying taxes on them.

When a record property owner seeks to clear the disputed title, the state vigorously pursues the ownership claims depicted on its published tideland maps and invariably uses *current* fair market value as the appropriate measure of the consideration due the state, thereby putting those record property owners in the position of buying the same property twice. The state is little concerned, if at all, that the source data for its "formerly flowed" tideland claims are often 75 or 100 or more years old; the state aggressively asserts its ownership, notwithstanding the admonition in *O'Neill v. State Highway Department, supra* at 326 that such data were not prepared with a tideland title controversy in mind, and, accordingly, there is room to question the reliability of such

data for resolving that controversy.

The choice that faces many record property owners is patently unfair. Why should they yield up to the state property which they have purchased in good faith and for full value? Yet, almost all private property owners find it prohibitively expensive to litigate with the state over its tideland claims. At trial, experts are usually required from a number of disciplines—these disciplines can include engineering, surveying, cartography, botany, geology, hydrology, real estate appraisal, law, etc. The gross injustice that this sort of case-by-case handling works is that many citizens will lose their land not because their state really has a superior title but because their private purse is no match for the state treasury.

CONCLUSION

The judgment and opinion of the Supreme Court of Mississippi in this case should be reversed because federal constitutional principles limit its sovereign ownership rights to the navigable waterways within its boundaries and do not permit retroactive expansion of those sovereign ownership rights into interior, tide-flowed wetlands which are not, and never have been, navigable. All 50 states possess the same ownership rights as an incident of their municipal sovereignty. For purposes of sovereign ownership rights, a waterway is "navigable" when it is navigable in fact. If the waterway is navigable in fact, the sovereign ownership rights extend from bank to bank but those sovereign ownership rights do not extend interior of those banks and include tide-flowed meadowlands and wetlands which are not, and never have been, navigable.

Respectfully submitted,

JOHN R. WEIGEL
Attorney for Amici Curiae

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